Supreme Court of the United States

OCTOBER TERM, 1950

No. 578

DAWN L. ALLEN
Petitioner

vs.

WILLIAM STANLEY LITSINGER AND ELIZABETH KNAPP LITSINGER
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Supreme Court of Appeals of Virginia, dated November 28, 1950, is unreported; likewise the opinion of the Circuit Court of Essex County, Virginia, dated June 20, 1950, is unreported.

It is imposible to refer to the pages of this record wherein these opinions appear for the reason that no

copies of said record, either printed or typewritten, have been delivered to counsel for respondents.

JURISDICTION

The petition for a writ of *certiorari* was filed by the petitioner on the 26th day of February, 1951, and counsel for the respondents were notified thereof on the 28th day of February, 1951. The jurisdiction of this court is invoked by the petitioner under Section 1256(3) of the Judicial Code as amended, 28 U.S.C.A. 1257 on the ground that the decision of the lower court denied a title, right or privilege claimed by the petitioner under the Federal Constitution.

QUESTIONS PRESENTED

"1. Whether the alleged consent of a natural mother, obtained by duress, to the adoption of her infant by strangers vested the Circuit Court of Essex County, Virginia, with jurisdiction over the subject-matter of the adoption.

2. Whether the affirmative withdrawal of the alleged consent to adoption, obtained by duress, by a natural mother before entry of a final decree of adoption operated to deprive the Circuit Court of Essex County, Virginia of its assumed jurisdiction over the subject-matter of the adoption.

3. Whether the Circuit Court of Essex County deprived the petitioner of due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution when, lacking jurisdiction over the subject-matter

of the adoption, it proceeded to enter a final order of adoption.

4. Whether the Circuit Court of Essex County, Virginia, deprived the petitioner of due process of law within the contemplation of the Fourteenth Amendment when, during the presentation of important evidence, the judge of that court willfully absented himself from the bench and court room for a considerable period of time.

5. Whether the Circuit Court of Essex County in the decree entered on June 20, 1950, in view of the new evidence of the case, erred in granting the plea of res judicata, and in denying the relief prayed for in her petition for a writ of habeas corpus and in dismissing the same thereby denying your petitioner due process of law in violation of the 14th Amendment to the Constitution of the United States."

STATUTE INVOLVED

The statutory provisions of law applicable to adoption are found in Michie's Code of Virginia of 1942, beginning with Section 5333a and continuing through Section 5333l, and acts amendatory thereof found in Michie's 1948 Cumulative Supplement to the Code of Virginia of 1942, under the same section numbers. All of the above mentioned sections are pertinent to the issues involved.

STATEMENT

The pertinent facts, all relating to the instant case, were clearly and concisely set out in a brief heretofore filed in this Court by these respondents during the October term, 1948, Case No. 696, opposing a petition to this Court for

a writ of *certiorari* to the Supreme Court of Appeals of Virginia which Court had refused to grant a writ of error to the Circuit Court of Essex County, Virginia, which said Circuit Court of Essex County had granted to the respondents a final order of adoption of said infant child in the original adoption proceedings.

The petitioner has quoted at length in her petition numerous excerpts taken from the testimony of witnesses who testified in the original adoption proceedings, and from the depositions of the Reverend Stanley Litsinger and wife filed in the habeas corpus proceedings concluded on December 13, 1949 in the Circuit Court of Essex County, Virginia, and made a part of the record in the instant case, which said excerpts are so selected as to tend to confuse and mislead this Court on the true facts of the instant case.

In view of the fact that the identical questions now being raised in the Court were raised in the original adoption proceedings in the Circuit Court of Essex County, Virginia, in the petition for a writ of error to the Supreme Court of Appeals of Virginia, in the petition for a writ of *certiorari* filed in the Supreme Court of the United States, counsel for respondents, while apologizing for being guilty of repetition, will quote from the statement of facts contained in their brief filed before this Court in the original adoption proceedings as such facts are equally applicable to the petition for a writ of *certiorari* in the instant case.

"By a decree of the Circuit Court of Essex County, Virginia, the illegitimate son of the petitioner was adopted by the respondents (R. 13, 14). The petitioner objects to such order of adoption on the grounds hereinabove set forth in detail. The pertinent facts in the case, based

largely upon the petitioner's own testimony, are as follows:

Before the petitioner, an expectant, unmarried mother, left Little Rock, Arkansas for Washington, D. C., she had planned to have her unborn baby adopted (R. 80). At her first conversation with Mrs. Stanley Litsinger in July, 1946, the petitioner volunteered the information that she planned to have her unborn baby adopted (R. 84). During the last half of August Mrs. Stanley Litsinger told petitioner that she and her husband had discussed the matter of his nephew taking the child and asked whether the petitioner wanted her to ask them about it. (R. 83). The petitioner agreed. (R. 84). The respondents agreed to adopt the child on August 21st or 22nd, 1946 (R. 85). On August 25th, the petitioner told Dr. Diament, her obstretician, that the respondents were going to adopt her baby. (R. 92). On November 18th, 1946, petitioner signed and acknowledged a contract with the respondents, dated November 15th, 1946, under which she agreed to give up the child upon its birth, and the respondents agreed to institute adoption proceedings as soon as practicable thereafter, the petitioner by such contract waiving notice of such proceedings. (R. 299, 300, 86). Before signing the contract the following conversation took place between the petitioner and Rev. Stanley Litsinger; which is typical of the conversations had between them with reference to this matter and which shows that the Rev. Litsinger and his wife did advise and counsel with petitioner but at no time attempted to exercise duress or compulsion upon her:

"Mr. Litsinger, am I doing the right thing to give my baby away?" He said, "Yes, that is the only thing to do" (R. 87).

Rev. Stanley Litsinger continued this assurance to the petitioner whenever the subject came up (R. 87).

Petitioner left the six-day old baby at the hospital when she was released on January 12, 1947, knowing that the baby would be delivered to the respondents the following day (R. 93, 94). Petitioner saw repondents on this day and raised no question about the adoption. (R. 95, 210).

On March 4, 1947, attorney for respondents mailed petitioner a formal consent to the adoption, which he asked her to sign as he did not wish to introduce the contract previously executed into evidence, and asking for petitioner's name instead of initials. (R. 307, 116). On March 6th, petitioner replied inquiring why it was necessary to give her full name (R. 308, 116). On March 8th, attorney for respondents answered, informing petitioner that the Department of Public Welfare required this information (R. 309, 116). On March 11th, Rev. Stanley Litsinger, with the petitioner's consent and approval (R. 99) wrote to the attorney for the respondents, stressing the desire of the petitioner for secrecy and objecting to giving her full name for this reason (R. 292, 293, 29). On March 13th the attorney for respondents replied to Rev. Stanley Litsinger setting out the confidential character of such information. (R. 302, 99). On March 18th, petitioner requested Mrs. Stanley Litsinger to take her to the bank to have her signature notarized to the formal consent. (R. 126, 127, 294, 34, 30). At this time the formal consent was notarized and two days later petitioner wrote to the respondent's attorney giving her full name and enclosing the formal consent. (R. 3, 4, 310, 122). She was not seeking or receiving counsel or advice from the Stanley Litsingers at this point. (R. 294, 30, 33, 34). The petitioner may have been emotionally upset to some extent, but

she knew the nature of the act she was performing (R. 35, 129, 61).

While the evidence of both Rev. and Mrs. Stanley Litsinger shows that they advised the petitioner that the adoption was for the best interests of all parties concerned, there is nothing in the record to indicate that they exercised any undue influence or duress on her, and the evidence shows they were entirely sympathetic with and considerate of the petitioner.

The record shows clearly that the petitioner not only signed the contract providing for the adoption of the child and later the formal consent, but also made repeated statements of her intention to have the child adopted, before the birth of the child, while she was in the hospital, and afterwards. (R. 92, 19, 20, 39, 293, 29). The first intimation that she had changed her mind, which obviously she did do, occurred in a conversation with Dr. Diament in May, 1947, four months after the birth of the baby. (R. 40, 42). The respondents, however, were not informed by the petitioner that she did wish to reclaim her child until December, 1947, when they had had the child eleven months (R. 225); they did know however, in September of that same year, that the petitioner had consulted an attorney with reference to her rights. R. 222).

The respondents, according to the testimony of numerous people, are well qualified in every way to raise the child, give him a Christian home and good environment, and in all respects are suitable parents. (R. 267), 264, 270, 249, 250, 251 and 252). Furthermore, they have now had the child for a period of twenty-eight months and are the only parents that the child has ever known, and the child is happy and being well cared for and well raised in his present environment.

The only physician who saw the petitioner during the period involved testified that her mental condition was no different from that of any other mother under similar circumstances (R. 37, 38), and that she was capable of evaluating what she should do (R. 38, 46, 47). After the petitioner should have recovered from childbirth and had been more or less discharged as a patient, she complained of pains, and not being able to find any cause for such pain, the physician suggested that she see a psychiatrist. (R. 49, 50).

The petitioner did not consult a psychiatrist until February 23, 1948, more than eleven months after signing the formal consent. The psychiatrist could not state that she was incompetent at the time of the signing of this formal consent (R. 173), and made no comment on her condition prior to that time.

The presiding Judge did absent himself from the court room at one stage of the proceedings but it was only for the purpose of allowing counsel for the petitioner to read into the record for consideration by a higher court the report of a welfare worker whose evidence the Court had previously ruled inadmissible. (R. 187, 188).

This case was fully heard in the Circuit Court of Essex County, Virginia, and the court entered its final order decreeing the adoption. The petitioner in these proceedings, not satisfied with the decision of the Circuit Court of Essex County, Virginia, filed a petition with the Supreme Court of Appeals of Virginia, asking for a writ of error and supersedeas to the judgment of the Circuit Court of Essex County, Virginia. The Supreme Court of Appeals of Virginia, after a careful consideration of the case, refused to grant a writ of error and supersedeas to

said judgment, thereby affirming the decision of the Circuit Court aforesaid."

The Supreme Court of the United States, after a careful consideration of the case, refused to grant the petition for a writ of certiorari to the Supreme Court of Appeals of Virginia in the original proceedings for adoption.

Thereafter, the petitioner applied for writ of habeas corpus to the District Court of the United States for the Eastern District of Virginia, and that Court refused to grant writ on the ground of lack of jurisdiction.

Thereafter, the petitioner applied to the Circuit Court of Essex County, Virginia, for a writ of habeas corpus asking the custody of the infant child, the subject of these proceedings, and by order entered on the 13th day of December, 1949, the Circuit Court of Essex County dismissed such petition on a plea of res adjudicata, at which hearing Judge Herbert Smith of Newport News, Virginia, presided, the regular Judge of such Court having disqualified himself because counsel for the petitioner had alleged improper conduct on his part in the original adoption proceedings. The depositions of Reverend and Mrs. Stanley Litsinger, which are alleged in the instant case to constitute new evidence, were presented and made a part of the record in those proceedings, but no effort was made to secure a writ of error from adverse decision on such petition.

Thereafter, the petitioner filed a second petition for a writ of habeas corpus in the Circuit Court of Essex County, Virginia and by an order entered on the 20th day of June, 1950, this petition also was dismissed on a plea of *res adjudicata* filed by the respondents. In this case the decision was rendered by Judge John L. Ingram of Richmond, Virginia, who had been designated to sit in the

place of the regular Judge, who had again disqualified himself due to the allegations of improper conduct above stated; the Supreme Court of Appeals of Virginia by order entered on the 28th day of November, 1950, refused to reverse the decision of the lower Court, entered on the 20th day of June, 1950, dismissing the petition for a writ of habeas corpus, and petitioner then applied to this court for a writ of *certiorari* in the instant case.

These respondents have had in their custody the child who is the basis of this suit from January 13, 1947, when he was seven days old, until the present time and the petitioner has seen him only once, in September, 1947, during such period.

ARGUMENT

The first four allegations of error set out under "Questions Presented" in the petition filed with the Court in the instant case are identical with the first four allegations of error set out in the petition of this identcal petitioner in her petition to the Court filed at the October term, 1948, case No. 696 for a writ of *certiorari* to the Supreme Court of Appeals of Virginia in the original adoption proceedings. In fact, not only the subject-matter but the wording of these allegations of error is identical. This Court in such former case dismissed the petition for a writ of *certiorari* and thereby sustained the Supreme Court of Appeals of Virginia in refusing to reverse the Circuit Court of Essex County, Virginia, which granted adoption of the said child by these respondents.

The argument submitted in said former case before this Court is here referred to and reiterated in part with apol-

ogy to this honorable Court, which said language is as follows:

"Petitioner contends that the consent to the adoption in this case was obtained by duress, and that therefore there was no lawful consent, and that the petitioner having attempted to withdraw her consent prior to the entry of the final decree of adoption, the Circuit Court of Essex County had no authority to enter the same as it was without jurisdiction, and that the entry of such decree deprived the petitioner of due process of law within the contemplation of the Fourteenth Amendment to the Constitution of the United States.

The statement of facts in this brief shows that no duress was brought to bear upon the petitioner and that she signed the two written consent agreements and acknowledged her signatures to each of them before a Notary Public of her own free will and in the execution of a plan conceived by her prior to the time when she first met the Reverend and Mrs. Stanley Litsinger. A reading of the evidence will conclusively show this to be true. The Circuit Court of Essex County, Virginia, decided that she had given her free consent to the adoption and its decision was affirmed by the Supreme Court of Appeals of Virginia.

It is alleged that petitioner affirmatively attempted to revoke her consent to the adoption after the entry by the Circuit Court of Essex County, Virginia, of the first order of adoption, and that thereby she deprived the Circuit Court of Essex County of jurisdiction. It is true, that the decisions in the various states in the union are not in accord on the question of whether the consent of a natural parent may be withdrawn prior to the entry of a final

decree of adoption. In several jurisdictions where the question has been presented the courts have refused to permit the withdrawal of such consent; *Wyness* v. *Crowley*, 292 Mass. 461, 198 N.E. 758 (1935); *Lee* v. *Thomas*, 297, Ky. 858, 181 S. W. (2d), 457 (1944); *In Re*: *Adoption of a Minor*, 155 Fed. (2nd), 870, (CCa 1946); *Lane v. Pippin*, 110 W. Va., 358, 158 S. E. 673 (1931). An annotation found in 156 ALR 1011 makes the following pertinent observation as to the present trend of authorities on this question:

> "While, as brought out in the earlier annotation, there is authority for the view that a natural parent's consent to the proposed adoption of a child, duly given in compliance with a statute requiring such consent as a prerequisite to an adoption, may be effectively withdrawn or revoked by the natural parent before the adoption has been finally approved and decreed by the court, and a few courts have indicated that the right to withdraw consent is absolute and not dependent upon any particular reason, it must now be said, in view of the later cases (arising, it will be noted, in jurisdictions other than those represented in the earlier annotation), that the trend of the more recent authority is toward the position that where a natural parent has freely and knowingly given the requisite consent to the adoption of his or her child, and the proposed adoptive parents have acted upon such consent by bringing adoption proceedings, the consent is ordinarily binding upon the natural parent and cannot be arbitrarily withdrawn so as to bar the court from decreeing the adoption, particularly where, in reliance upon such consent, the proposed adoptive parents have taken the child into their custody and care for a substantial period of time, and bond of affection, in the nature of a "vested right", have been forged between them and the child."

It is true that the above quoted cases are based in large part upon the language of statutes providing for the adoption of infants of the several states in which these cases arose, which will naturally bring us to a discussion of the Virginia adoption statute, which is found in Sections 5333a down to Section 5333l (inclusive) of Michie's Code of Virginia (1942) as amended.

The Virginia law differs from that of most of the states of the union in that under Section 5333c it is provided that there be a preliminary investigation before the entry of the first order which is provided for in Section 5333e. This preliminary investigation provides for inquiries as to "(1) whether the petitioner is financially able and morally fit to care for and train the child, (2) what the physical and mental condition of the child is, (3) why the parents, if living, desire to be relieved of the responsibility for the custody, care and maintenance of the child, and what their attitude is toward the proposed adoption, (4) whether the parents have abandoned the child or are morally unfit to have custody over him, (5) the circumstances under which the child came to live and is living in the home of the petitioner, and (6) whether the child is a suitable child for adoption by the petitioner", together with any other inquiries which the court may require.

Under Section 5333d this first order can not be made unless the written consent thereto of the natural parent, signed and acknowledged before an officer authorized by law to take acknowledgments, is filed to be considered along with the petition.

The first order is the actual order of adoption, in that under the Virginia statute it declares "that henceforth, subject to the probationary period, hereinafter provided

for, and to the provisions of the final order of adoption, the child will be, to all intents and purposes, the child of the petitioner", and the court may in this order change the name of the child if requested so to do. According to Sub-Section C of Section 5333e the court may revoke its first order of adoption at any time prior to the entry of the final order only "for good cause shown".

The second or final order of adoption, as provided in Section 5333g shall be entered by the court after the expiration of one year, provided "the court is satisfied that the best interests of the child will be served thereby". The court is not required or permitted by such section to take any other factors into consideration. No consent of the natural parent is required for the entry of the final order.

A reading of the evidence shows conclusively that the petitioner failed to show any good cause for the revocation of the first order of adoption and that her decision to attempt to withdraw her consent was in fact an arbitrary change of position on her part which took place after the entry of the first order of adoption as she did not appear either in person or by counsel to object to the entry of the said order, and had previously given her written consent, acknowledged before a Notary Public, to the entry of same.

Obviously therefore, the only question that the court could consider at the time it was proposed that it enter a final order, was whether or not the best interest of the child would be served by the entry of such final order. It must be borne in mind that when this final order was entered (June 4th, 1948), the child was then seventeen months of age and had been in the sole custody of its

adopted parents since it was six days old. According to the evidence it had been adopted by people of culture and high moral standing, who were in every way able and willing to rear the child, and who, because of long association with him, had become as fond of him as if he were their own flesh and blood. The adopted parents were the only parents that he has ever known and it was for these reasons that the Circuit Court of Essex County under Section 5333g of Michie's Code of Virginia (1942) as amended, entered its final order of adoption.

According to the certificate of evidence in this case, the petitioner has failed to show that her consent was obtained by duress as alleged in her petition, having actually given her written consent to said adoption upon two separate occasions, after having fully and maturely considered the same with all implications. Petitioner made no objection to the adoption until after the first and actual order of adoption had been entered when the only question before the court was what would be to the best interests of the Child. Therefore, the contention on the part of the petitioner that the Circuit Court of Essex County had no jurisdiction over the matter is not sustained by the evidence in this case, and there has been no violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, which petitioner claims for the first time in this court, not having raised same at any stage in the proceedings heretofore.

The petitioner's sole remaining assignment of error lies in the allegation that the Judge of the Circuit Court of Essex County, Virginia, absented himself from the court room while material evidence was being introduced. An examination of the record and the statement of facts here-

inabove given shows that such Judge ruled inadmissible a report of a welfare worker, who was called upon to testify in this case, on the ground that such welfare worker had only interviewed persons who had already testified in this cause and whose evidence is in the record. Counsel for the petitioner requested the court to be permitted to get into the record this report for consideration by a higher court on the question of error in refusing to admit the evidence. As the Judge had ruled this evidence inadmissible, he felt that it was improper for him to hear the same and therefore retired from the court room while such report was being read into the record. (R. 187, 188). Counsel for the petitioner failed to note an exception to the ruling of the court to hear this evidence, and made no objection, either in the Circuit Court of Essex County, or in the petition filed with the Supreme Court of Appeals of Virginia to the action of the Judge in retiring from the court room while this report was being read into the record. Obviously the conduct of the Judge was entirely proper and he would have been subject to criticism had he acted otherwise, since the Judge was acting without a jury, and was therefore passing on the facts as well as the law. It is, therefore, apparent that the due process of law clause of the Fourteenth Amendment to the Constitution of the United States was not violated by this action of the Judge of the Circuit Court of Essex County, Virginia."

These four points, being the first four listed under "Questions Presented", have all been passed upon in former proceedings before this court, and are therefore barred from further consideration under the doctrine of *res adjudicata.*

The only additional question presented in the petition in the instant case is as follows:

"5. Whether the Circuit Court of Essex County in the decree entered on June 20, 1950, in view of the new evidence of the case, erred in granting the plea of res judicata, and in denying the relief prayed for in her petition for a writ of habeas corpus and in dismissing the same thereby denying your petitioner due process of law in violation of the 14th Amendment to the Constitution of the United States."

It is respectfully submitted that the depositions given by the Reverend Stanley Litsinger and wife on December 8, 1949, do not constitute "new evidence". Said depositions are a rehash of what they had testified to in the previous adoption proceedings which were a part of the record and which were considered by the several Courts that were called upon to consider same. It is true that a reading of the new depositions show that both witnesses engaged in considerable argument and that their testimony as to the facts is identical. These two witnesses gave their first depositions in May, 1948, more than a year after the events occurred. They gave their second depositions on December 8, 1949, approximately a year and a half thereafter. If there were any difference or contradictions by these witnesses with the testimony first given by them, it is submitted that they would more apt to be correct in the testimony of May, 1948. However, there are no real differences or contradictions in such testimony. To show this we quote from the second depositions of the Reverend Stanley Litsinger given on December 8, 1949 in which when referring to his depositions previously given and having been asked whether or not he had read the same with the petitioner, he replied as follows: "We simply wanted to refresh our minds as to what the original depositions contained. There is no reason to change my state-

ment made, other than to correct any false impression that may have been given by it.—To place the emphasis where it should be placed—where I originally intended it to be placed," which is quoted in full on page 12 of petitioner's brief in the instant case. The above quotation from the Reverend Litsinger shows conclusively, we think, that the only difference between his second deposition and his first is that in his second deposition he largely abandoned the position of witness and became counsel indulging in considerable argument in the interest of the petitioner.

Assuming, but not conceding, that the evidence contained in the second depositions of the Reverend and Mrs. Stanley Litsinger met the requirements of "new evidence", counsel for the respondents respectfully submit that their plea of *res adjudicata* in the instant case is a bar to this proceeding since this evidence was before the Circuit Court of Essex County, Virginia in a habeas corpus proceeding involving the same parties and the same subject-matter on the 13th day of December, 1949, and in such proceedings the petition for a writ of habeas corpus was dismissed and the petitioner in that case, who is also the petitioner in the instant case, failed to apply for a writ of error from such decisions, and that such failure on her part renders all matters before the court in such proceedings *res adjudicata* in subsequent proceedings such as the instant one.

CONCLUSION

The respondents therefore respectfully submit that all matters at issue in the instant case have been heretofore passed upon by the several Courts hereinbefore mention-

ed, and that the plea of *res adjudicata* is conclusive. They, therefore, respectfully submit that the petition for a certiorari should be denied.

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March, 1951

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